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No. 91-1370

In The

Supreme Court of the United States

OCTOBER TERM, 1991

MABEL A. KING,
Petitioner,

v.

WALTER B. RIDLEY, DIRECTOR,
DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, AND
THE DISTRICT OF COLUMBIA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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ARGUMENT

The District of Columbia agrees that the issue presented by this case — whether risk enhancement is available under the typical fee-shifting statute — should be reviewed by this Court. Indeed, this Court has already agreed to address this issue in *City of Burlington v. Dague*, No. 91-810. In *Dague*, this Court will revisit *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711 (1987), a decision that has caused the courts of appeals to be hopelessly in conflict over the meaning of fee-shifting provisions in more than 100 federal statutes.

[1] James F. Palmer, who was sued in his official capacity as the Director, District of Columbia Department of Corrections, no longer holds that position. The present Director is Walter B. Ridley. The respondents will be collectively referred to in this brief as the District of Columbia or the District.

There is no reason, however, to review this case with *Dague* simply because this case has a more extensive factual record.[2] The United States Court of Appeals for the District of Columbia Circuit sitting *en banc* has correctly ruled that risk enhancement is not available as a matter of law. As a consequence, the factual submissions on which this petition so heavily relies are irrelevant.

The views of the District of Columbia on the availability of risk enhancement under the typical fee-shifting statute have been presented in an *amicus* brief submitted by the District and several of the States in *Dague*. The *amicus* brief takes the position that Congress has not authorized risk enhancement in such fee-shifting statutes. It also takes the position that, if risk enhancement is available, attorney affidavits of the sort submitted in *Dague* and in this case are not sufficient under *United States Department of Labor v. Triplett*, 494 U.S. 715 (1990), to discharge whatever burden this Court may impose on prevailing plaintiffs to show that risk enhancement is necessary to ensure that they were able to secure counsel. The insufficiency of such evidence is underscored by the fact that here, as in *Dague*, competent counsel agreed to undertake representation on a contingent-fee basis without any assurance of risk enhancement.

Finally, the District notes a significant and telling error in the petition here. The petition claims that the D.C. Circuit erred in setting aside the risk enhancement awarded by the trial court because "[t]he trial court ruled properly on all the evidence before it." Cert. Pet. at 29. The petition also claims that, if this Court should adopt Justice O'Connor's concurring opinion in *Delaware Valley II*, "then the decision of the D.C. Circuit *en banc* should be reversed and the contingency enhancement of 100 percent reinstated." Cert. Pet. at 30.

[2] On March 9, 1992, this Court entered an order denying petitioner's motion to expedite consideration of this case to permit it to be argued with *Dague*.

The trial court, however, did not award a risk enhancement of 100 percent; it awarded a risk enhancement of 50 percent. See Cert. Pet. App. at 75a. Thus, if the petition is correct that the trial court acted properly, counsel for petitioner is entitled to only half of the 100 percent enhancement requested in this Court.

The petition's serious error in understanding what the trial court did highlights one other important point. There is not now a single judge on the D.C. Circuit who supports the across-the-board 100 percent risk enhancement sought in this petition. The dissenters in the *en banc* decision would have affirmed the trial court's risk enhancement of 50 percent; they did not state that this award should be set aside as an abuse of discretion and replaced by a 100 percent enhancement. See Cert. Pet. App. at 28a-50a.

CONCLUSION

This case should be held in abeyance pending disposition of *Dague*. If, as the District has urged, this Court in *Dague* should decide that risk enhancement is not available under the typical fee-shifting statute, the petition for review here should be denied.

Respectfully submitted

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